

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1324

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

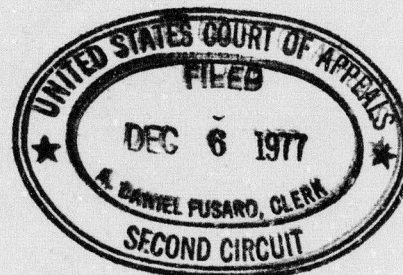
-against- :

FRANK MOTEN, :

Appellant. :

B P/S
Docket No. 77-1324

BRIEF
REPLY/FOR APPELLANT FRANK MOTEN



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

Dkt No. 77-1324

FRANK MOTEN, :

Appellant, :

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY FOR APPELLANT FRANK MOTEN

Preliminary Statement

The Appellant respectfully submits this reply to the Government's brief.

Perhaps the most conspicuous attribute of the Government's answer is its disinclination to squarely address the Appellant's previous arguments. Specifically, the Government declines entirely to address the Appellant's argument, in Point I of his brief, that, in light of the

presumptively prejudicial extraneous influence upon the jury occurring as a result of Keno's wrong-doing, the Government bears the burden of proving that the resulting jury verdict remained untainted. Indeed, the Government suggests that this argument is indistinguishable from the Appellant's other arguments.* (Gt. 9-10)

Apparently, the Government concedes, or does not regard as significant, the crucial factual predicate of the Appellant's argument in Point I, to wit: that Keno's approach to Yolanda Intersimone on September 19, 1976, was not his first encounter with Moten's co-defendants. For instance, the Government remarks that, at the time of the District Court's in camera ex parte interview of Keno, "a strong suspicion appeared that the juror already had been corrupted by the defendants" (Gt.-4). (emphasis supplied) Similarly, the Government once speaks of the dangers of juror harassment and corrupt influence being "particularly present in this case in which defendant's attempt to corrupt a juror already has been established." (Gt.-9) (emphasis supplied)

*"Gt" designates the Government's brief; all other citations are to the Appellant's original index.

The Appellant submits that, unless these statements are merely rhetorical imprecisions, the Government has conceded that the instant case is directly controlled by the Supreme Court's holding in Remmer v. United States, 349 U.S. 227 (1959), that the Government must disprove prejudice once some presumptively prejudicial contact with the jury has been established.

Moreover, the Government's answer to the Appellant's detailed factual analysis, presented to this Court in Point II of his brief, is effectively a non-answer that dismisses that analysis as a "tortured interpretation" (Gt.-11) and reiterates the Government's now familiar position that the Appellant's submissions to the District Court were, by dint of their legal incompetence, insufficient predicates for the relief the Appellant sought.

Notwithstanding these considerations, the Government's answer does raise several questions to which the Appellant deems a reply proper.

POINT I

THE GOVERNMENT MUST AFFIRMATIVELY JUSTIFY ITS
REFUSAL TO DISCLOSE THE SEALED RECORDS OF THE
KENO INCIDENT.

In Point III of his brief, the Appellant argued that the Government bore the burden of justifying its refusal to disclose the records of sealed proceedings relating to Keno's discharge. In response to this argument, the Government, in Point II of its brief, writes:

Moten points neither to statute nor case authority to support his claim, nor has he given any reason why he believes the records would be helpful to his position.
(Gt.-19)

The latter half of this argument is simply disingenuous. The entirety of the Appellant's argument in Point I, discloses how these records are "helpful" to Moten. If the Government bears the burden of disproving taint, then the Government must come forward with evidence. If the evidence contained in these records corroborates that already presented to the District Court, and if these records do not affirmatively establish that the jury remained untainted by Keno's exploits, then the Government cannot prevail on the issue of fact raised within the so-called Remmer hearing.

Thus, these records are helpful to Moten in two ways. First of all, they contain the sworn statements of some of those declarants whose statements were presented to, and promptly rejected by, the District Court as hearsay. Presumptively, these records will support the Appellant's previous factual allegations. Additionally, it is highly likely that these records will establish the Government's inability to meet its evidentiary burden under Remmer v. United States, supra. In short, these records are not only helpful, they are crucial.

Secondly, the Government's observes that "Moten points neither to statute nor to case authority" to justify his argument. Although the Appellant initially presented Point III of his argument as arising necessarily from his preceding arguments,* (At-49) the position he takes is easily justified by independent authority.

Disclosure of grand jury minutes,** for instance, is expressly authorized by Rule 6(e), F.R.Cr.P., which, in pertinent part, reads:

(e) Secrecy of Proceedings and Disclosure.
Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who

* "At" designates the Appellant's original brief.

** The ensuing discussion deals primarily with the disclosure of grand jury minutes. As the Government has noted (Gt.-19),
(footnote continued on following page)

transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding... (emphasis supplied)

The Appellant submits, alternatively, that he is entitled to the disclosure of the Government's sealed records either as a matter of right, or because he has established a compelling, particularized need for these records.

Case law interpreting Rule 6(e) clearly recognizes the principle that, notwithstanding the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts," United States v. Proctor and Gamble Co., 356 U.S. 677, 681 (1958); it is equally well-established that the Government's interest in secrecy cannot always prevail. As the Supreme Court, in United States v. Socony-Vacuum Oil Co. 310 U.S. 150, 234-5 (1950), noted:

Grand jury testimony is ordinarily confidential [citation omitted] But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. (emphasis added)

(footnote continued from previous page)
some but not all of the sealed records requested by the Appellant are grand jury minutes. To the extent this Court accepts the following arguments, the alleged necessity of sealing non-grand jury records is, the Appellant submits, accordingly disproved. However, vis a vis the in camera testimony taken from Yolanda Intersimone and William Keno by the District Court, any justifications for secrecy that are unique to the grand jury cannot justify the continued secrecy of the record of these proceedings.

See also, United States v. Alper 156 F.2d 222, 226 (2nd Cir. 1946).

The crux of the standards governing the limited access to the records of grand jury proceedings has been clearly stated by the Supreme Court:

This 'indispensable secrecy of grand jury proceedings '[citation omitted] must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity. (emphasis supplied)

United States v. Procter and Gamble Co., supra at 681.

Grand jury proceedings may thus be properly disclosed where there is a compelling, particularized need.

To whatever extent this standard represents a departure from the traditional rule of secrecy, it is "entirely consonant with the growing realization that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." Dennis v. United States, 384 U.S. 855, 870 (1966). Moreover:

Under these circumstances* it is especially

* The "circumstances" referred to by the Court as the trial of multiple defendants in a conspiracy case -- exactly the type of trial involved here. In Dennis, the Court was concerned with the availability of grand jury minutes sought as a ground for impeaching the Government's witnesses. Throughout its discussion the Court was concerned with the quality, and the integrity of the jury's verdict in a mass conspiracy case. Precisely that concern, albeit in a different context, is the issue presently addressed by the Appellant.

important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a store house of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.

Id. at 873.

The Appellant's request for all sealed records relating to Keno's dismissal reflects a need that is both compelling and particularized. The Appellant's need is clearly compelling. Notwithstanding the Government's conjectures to the contrary (Gt.-13), those who possess the relevant knowledge are not available to Moten. Certainly, Keno is not available, since any contact with that former juror -- or any other juror -- is barred by the District Court's order forbidding the defendants, or their attorneys, from having any contact with jurors. Similarly, as the Appellant's previous arguments indicate, Ms. Intersimone was not then available to the Appellant.* If denied access

* The Government insists that: "Nowhere does Moten deny the availability of Ms. Intersimone, though he complains that relations between him and Mr. Intersimone have not always been cooperative: (Gt.-13). The Government's statement, while true, is misleading and unfair.

In the proceedings before the District Court, the question of Ms. Intersimone's availability was never expressly put to Moten, or to his attorney.. Thus there is no statement on the record regarding her availability as an affiant, or as a witness. Moreover, the question of her availability or lack thereof, if raised by either party below, would have raised only
(footnote continued on following page)

to the prior statements of these two individuals, the Appellant is unable to proceed

The Appellant's request is particularized. No dispute can exist here. The Appellant seeks only the in camera testimony, and the grand jury testimony of Keno and Ms. Intersimon. This testimony is presumably brief and relates to a specific event, or a series of events -- those involving attempts to tamper with Moten's jury. In making this request, the Appellant has a particularized objective -- to determine in an adversary proceeding whether the evidence now available to the Appellant and to the District Court necessitates further inquiry into the Keno affair.

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collateral issues.

For the purpose of this appeal, the Appellant has argued his case solely from the record created before the District Court. The Government's exploitation of this now inescapable limitation in the record is not, the Appellant submits, wholly proper. That is particularly so here where, in light of the obvious utility of a sworn statement by Ms. Intersimone, the Appellant's failure to produce such a statement more strongly supports an inference that Ms. Intersimone was unwilling to make a statement, then it supports an inference that

(footnote continued on following page)

* The Government's assertion (Gt.-19), presumably an oversight, that Moten already possesses the in camera testimony of Yolanda Intersimone is incorrect. Part E of the Appellant's Appendix, referred to by the Government, contains only the in camera testimony of Mr. Keegan.

e.*
Moreover, the uniqueness of the circumstances within which the Appellant's motion for a new trial is sought -- i.e. where the Government has already investigated and to some extent prosecuted a former member of the jury whose integrity is subject now to challenge -- establishes that the Appellant's request is sufficiently "particular". Thus, if granted, it will not stand as an invitation to future defendants to raise spurious challenges to their convictions. The traditionally feared "floodgates of litigation" will not be opened by a favorable disposition of the Appellant's case.

Finally, the Appellant cannot, and need not, be satisfied that the District Court has perused these documents. The Supreme Court in Dennis v. United States, 384 U.S. at 874, commenting on the then liberal practice in this Circuit of requiring a District Court to review the prior grand jury testimony of witnesses against a defendant, observed:

While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony -- and we do not disapprove it for that purpose -- it by no means disposes of the matter. Trial judges ought not to be burdened with the task or the

(footnote continued from previous page)
Mr. Keegan, Intersimone's former attorney, was lying when he made his sworn statement as to Ms. Intersimone's previous disclosures to him.

responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, "it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness." Pittsburgh Plate Glass, 360 U.S., at 410 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. (emphasis supplied)

In response to this injunction, the prevailing rule of practice in this Circuit was altered. In United States v. Youngblood, 379 F.2d 365 (2nd Cir. 1967), this Court adopted the following prospectively applicable rule:

The District Courts of this Circuit at the request of the defendant should order that the defendant be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material; we are holding that a defendant should be entitled to see all the grand jury testimony of each witness on the subjects about which that witness testified at the defendant's trial. Nevertheless, despite this general rule, the Government, upon a showing that disclosure of particular material would jeopardize national security or should be denied for other proper reasons, may seek a protective order from the trial court in order to prevent disclosure to the defendant of that particular portion of the grand jury material. (emphasis supplied)

Thus this Circuit Court adopted a rule whereby, unless the Government proves a contrary necessity, a defendant is

entitled to review the grand jury testimony of witnesses testifying against him.

The Youngblood rule, or its analogue, must be applicable in the instant case. As the Appellant has previously argued, the Government has the burden of negating the prejudicial impact of Keno's attempts to become the agent of those of whom he ostensibly sat in judgement. The Government cannot avoid this burden by merely acquiring an order sealing all relevant records and then justifying this secrecy on the grounds that some -- not all -- of the records thus sealed are grand jury transcripts. In light of this Court's holding in Youngblood, and in light of the policy judgement underlying that holding, the Government enjoys no presumption that these records are entitled to secrecy.

The gravamen of the Appellant's argument here is that the District Court abused the discretion vested in it by Rule 6(e), F.R.Cr.P. This argument is bolstered by the uniqueness and the seriousness of the issues now raised, and by the well-established policy judgement that extraneous efforts to influence a jury's ongoing deliberation is so serious a matter that traditional evidentiary restraints are deemed inapplicable. Mattox v. United States, 416 U.S. 140 (1892)

The Appellant respectfully submits that he is entitled to disclosure because he has made the requisite showing of particularized need, and that, alternatively, he is entitled to disclosure as a matter of right, regardless of whether that showing of particularized need has been made, unless the Government can affirmatively establish the need for continuing secrecy.

POINT II

RULE 606(b), F.R.E., DOES NOT SUPPORT THE GOVERNMENT'S ARGUMENT

The Government argues that Moten "asks this Court to disregard the teaching of decades of cases, as well as the wisdom of recently enacted Rule 606(b)" (Gt.9). The Appellant submits that the Government's reliance on Rule 606(b) is misplaced.

In pertinent part, Rule 606(b) provides:

Inquiry into validity of verdict or indictment.
Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.
(emphasis supplied)

This Rule is merely a codification of prior case law. Specifically, the exception to the general incompetency of jurors as witnesses recognized by the Supreme Court in Mattox v. United States, supra, is embodied in the new Rule. Thus jurors are competent to testify as to the existence of outside

influences acting upon them.

Since the inquiry sought by the Appellant falls entirely within this exception, Rule 606(b) supports Appellant's, not the Government's, argument. See, generally, the discussion of the legislative history of Rule 606(b), 28 U.S.C.A., F.R.E. 606(b) (Historical Note); Moore's Federal Practice, Rules Pamphlet, Part 2, pp. 612-614.

POINT III

THE APPELLANT IS PRESUMPTIVELY PREJUDICED BY
THE REPORT OF NEWSPAPER ARTICLES TO THE JURY.

The Government has failed to meet its burden of establishing that newspaper articles, recounted to the jury by the two Hispanic jurors, No. 2 and No. 8, during its deliberations, resulted in no prejudice to the Defendant.

The Government presents two arguments in this regard: First, that the only articles possibly reported to the jury were two articles appearing in El Diario on April 23, 1977 and August 15, 1977; and secondly that the articles contained no information not otherwise before the jury.

The Government's first argument is insufficient. Ms. Blau alleged, not that newspaper articles were actually presented to the jury, but that they were reported to the jury. (B-4) As the Appellant has argued previously, the alleged reports by the Hispanic jurors do not conform to the contents of any known newspaper articles (At.-20,21). Consequently, if the Government is to establish the absence of prejudice, it must prove that what the Hispanic jurors actually told the jury was not prejudicial. In this regard, the El Diario's pre-eminence among other local Spanish newspapers (Gt.-17) is of little or no consequence.

Secondly, assuming, arguendo, that the El Diario articles were accurately reported to the jury, the Appellant is prejudiced by that article's reference to an indictment for "\$600 million Drug Trafficking" upon which "second on the list appears Frank Moten". At trial, the Government alleged that Moten was a major financier of a national network of narcotics dealers. Consequently, any data as to the magnitude of the financial resources allegedly at the disposal of Moten and his co-defendants, directly implicates and incriminates Moten.

The District Court's argument that this data could not be prejudicial is erroneous. In its opinion, the Court argued:

The only information contained in this article that is arguably prejudicial to anyone other than Alvarez is the headline, declaring that the value of the narcotics involved in the alleged conspiracy was \$600 million. Although there was no direct evidence to the effect that the value of the narcotics involved was \$600 million, there was evidence before the jury about hundreds of kilos of cocaine and several kilos of pure heroin, as well as the value of cut and uncut narcotics and the degree to which the narcotics would be cut before distribution to the ultimate consumer. While the \$600 million amount may have been inaccurate, it is certainly within an order of magnitude of what the jury could conclude from the evidence before it and therefore not prejudicial.
(D-11) (emphasis supplied)

The Appellant respectfully submits that the District Court cannot properly discount the prejudice of a newspaper article by noting that, notwithstanding the absence of any direct evidence, the jury could have reached a finding consistent with the overstated claim appearing in the article. It is under precisely these circumstances that the El Diario article is likely to most influence the jury -- by bolstering a conclusion as to crucial facts not the subject of direct testimony to the jury.

POINT IV

THE GOVERNMENT MISREPRESENTS
THE CONTENTS OF THE BLAU TAPE

The transcript of an interview with the Jury Forelady, Ms. Blau -- an interview conducted by Intersimone's attorney, and released to Moten's attorney only as a result of the District Court's order -- was presented to the Court below. No full transcript of that tape, to the Appellant's knowledge, has ever been introduced into the record.

However, some part of that interview was summarized in the District Court's opinion (D.4). Referring to that summary (Gt.12), the Government states:

Ms. Blau stated several times that none of the jurors had any idea why juror number ten was excused, nor was it ever suggested that there had been an attempt to influence the jury.

The Government refers to, but clearly overreads, the following statement by the Court:

The Blau tape clearly indicates that the reasons for Keno's dismissal were not a topic of speculation, conjecture, or even discussion among the assembled jury.
(emphasis supplied)

(D.4)

Heretofore, the Appellant has not relied upon any parts of the Blau interview not quoted in the Court's memorandum opinion. However, other remarks made by Ms. Blau during that interview clearly negative the Government's statement that "none of the jurors had any idea" (emphasis in original) about the reasons for Keno's dismissal. When asked what happened when Keno was dismissed, Ms. Blau made these remarks:

O that's right. He had been asked in. The Court Clerk called what's his name in to his chambers [and he didn't appear again] you know so we knew it may have had some thing to do with him. These questions...We just tied it up, but we were not told by the judge that his questioning us briefly had anything to do with the dismissal. (emphasis in original)

* * * * *

Just that from thence on, we were going to have a Marshall take us out to lunch. And we were not allowed to circulate around.

* * * * *

The Court Clerk I think he did give us a little hint...

* * * * *

wanted to talk to us. It appeared that people were trying to talk to us.

* * * * *

I think that he...He was trying to be very informal with us and relaxed...

[because] nobody knew what's cooking, what's happening, you know...And here again I'm not 100% sure, but I believe it was him who said a little something with

regard to they don't want us to be moving around the halls...or possibly people talking to us. I believe it was him. He told us.

151-174
(T. 913-558) *

These statements indicate that it is virtually impossible that the jurors would not have "any idea" when Keno was dismissed. That the jurors when assembled to deliberate never expressly considered the reasons for Keno's dismissal suggests only that they attempted to conscientiously perform their duty. Yet Ms. Blau's statement in this regard does not negative the likelihood that these events prejudicially influenced the jurors long before they began their formal deliberations.

The question implicitly raised on this appeal -- that is to say, the issue Appellant attempted to raise in the District Court -- is whether the jury became infected with prejudice during the trial and as a result of the "Keno affair", the scope of which as yet remains unknown.

Indeed, whatever taint arose from this incident would be most damaging, not if Keno's dismissal was the focus

* (T. XXX) designates the location of this remark measured on the automatic counter on a standard cassette tape recorder. (T. 00) accordingly, refers to the beginning of the tape.

of express consideration, but if the entire incident impressed the jury that it was under seige by the defendants.

The Appellant submits, once again, that Ms. Blau's statements create questions of fact vis a vis Keno's dismissal, and that consequently, the Appellant is entitled to an evidentiary hearing before the District Court.

POINT V

THE APPELLANT APPARENTLY MISQUOTED THE
TRANSCRIPT OF THE PROCEEDINGS BELOW

The Government argues that, in quoting the District Court, the Appellant "relies on an obvious typographical error" (Gt.-11) when he asserted that:

Even the District Court subsequently recognized that they (defense counsel) were unaware that a juror had made an impermissible approach (H-43).

In retrospect, the Appellant agrees that the transcript probably -- if not obviously -- contains a typographical error.

The colloquy from which the Appellant quotes reads, in pertinent part:

MR. FISHER: At the time your Honor was conducting your voir dire of the jurors you pointed out that the questions were carefully considered by counsel. They were. Of course, most of the counsel, in fact each except for Mr. Keegan was absolutely unaware of what was going on so to whatever extent they gave this court advice they did so in great ignorance.

THE COURT: They were aware that a juror had misconducted himself and the question was whether others had been touched.

MR. FISHER: They were unaware of the Brightman situation --

THE COURT: They were unaware that a juror had made an impermissible approach. I remember that distinctly because it got onto the record in a way that I was a little bit distressed about at the time, if I am not mistaken. (Emphasis Supplied)

The District Court's underscored remark was read by the author of the Appellant's brief as restating and assenting to Mr. Fisher's immediately preceding remark concerning the Brightman situation. The context in which the Appellant quoted the District Court indicates that the quotation was employed consistent with that interpretation.

(Bt.48)

CONCLUSION

The Appellant is entitled to the relief sought herein.

Respectfully submitted,

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